THE ELASTICITY OF THE CONSTITUTION.

AS the period of the formation of the American Union becomes more and more remote, it becomes constantly more important to inquire to what extent the decision of a question of federal constitutional law may properly be affected by the many changes in language, customs, morals, and in individual and national environment which have taken place since the adoption of our fundamental law. Since that time, the thirteen sparsely settled colonies strung along the border of a wilderness have become a great, powerful, and wealthy nation, second to none in culture and resources. Political opinions have changed: the doctrine of national unity has almost completely demolished its once mighty antagonist — the theory of state sovereignty. Commerce, instead of being conducted by stage-coaches and sail-boats, is carried on by railways, telegraphs, and ocean liners. Ideas of morality have changed: lotteries and duelling, once regarded as praiseworthy, are now thought pernicious and immoral. The effect of all these changes upon our system of constitutional law is surely an interesting and important matter for legal inquiry.

To a certain extent, our altered conditions and especially the Civil War have produced what may be termed a legislative alteration of the Constitution — the Thirteenth, Fourteenth, and Fifteenth Amendments. It is not the purpose of this article to discuss the influence of changes in circumstances and in popular opinion in bringing about these important amendments, or the likelihood of other amendments being carried through in the future by similar forces. Interesting as such inquiries might be, they concern the historian and the sociologist rather than the lawyer. The present paper deals with the problems which arise when a constitution, the letter of which remains unchanged, is to be applied by the courts to an altered state of facts.

The topic, therefore, is merely a branch of the science of constitutional construction, which is itself part of the still more comprehensive science of legal interpretation. The cognate topic of the construction of statutes received considerable attention at the hands of the civilians, and has been ably treated by Anglo-Saxon

writers.[1] The principles relating to statutory interpretation apply in general with equal force to the interpretation of the Constitution. Both are laws. The chief difference between them lies in the fundamental, organic character of a constitution — a *lex legum*. A constitution is designed to contain only the first principles of government; a statute, to correct any evil, great or small, which the legislature may discern in the body politic. Accordingly, statutes are passed entirely with reference to the needs of to-day; to-morrow, if conditions change, they may easily be amended or repealed. They are, therefore, construed with reference to the conditions which gave them birth and generally before those conditions have passed away. On the other hand, a constitution, being fundamental, is intended to endure through all legislative vicissitudes and statutory upheavals. To be sure, some of the recent state constitutions, with their multiplication of detail, may seem to lack somewhat of this elementary character. But the federal Constitution still retains only the framework of government; and, as the process of amendment is so tedious and difficult, bids fair to be, in form at least, as permanent as its framers intended. It is this fact which renders the present inquiry necessary. With the exception of the three amendments brought about by the Civil War, the words of the Constitution have remained unaltered since the year 1803: the conditions and surroundings of the people by whom the instrument was adopted and for whose government it provides have wonderfully changed. Is it ever possible to justify a departure from the original intention? Can the Constitution be changed, silently and without formal amendments? These are the questions to be here discussed.

The subject is, of course, a very broad one. It has to do with all portions of the field of constitutional law. Questions under the Fourteenth Amendment, questions under the interstate commerce clause, questions involving merely private rights, and vast political questions involving the whole country, — all are included. It is just such subjects which are likely to be slighted by the bench and bar. The investigation of such immense questions rarely seems necessary to the settlement of a particular litigation. It is not surprising, therefore, that little direct assistance is afforded by decided cases.

[1] Maxwell, Interpretation of Statutes; Hardcastle, Interpretation of Statutes; Potter's Dwarris on Statutes; Sedgwick, Statutory and Constitutional Law; Endlich, Interpretation of Statutes; Bishop on Written Laws; Sutherland on Statutory Construction.

Of course, we should eliminate from the discussion any departures from principle and from the intention of the constitution-makers which have become established by repeated decision. One of the chief characteristics of the common law, in reference to which our organic law was composed,[1] is its respect for judicial precedent. Accordingly, any flagrant departure from the principle of *stare decisis*, even in order to correct an error, would do greater violence to the intention of 1789 than the mistake it was designed to remedy.[2]

In the same way, the result of the Civil War must be taken to be conclusive on the question of constitutional law directly in dispute. No series of decisions of the Supreme Court could establish so sacred a precedent. Rightly or wrongly, for better or for worse, the question is decided. The affair is *res judicata*. A constitutional amendment was not passed because admitted to be superfluous. However, the binding effect of the "arbitrament of arms" is confined to the precise point at issue between the contending parties. It is, therefore, dangerous to argue from the "changed relations of the States produced by the Civil War," as is not seldom done. Such arguments are vague and unsatisfactory. They appeal rather to the passions than to the understanding, and are usually advanced not as argument but as a substitute therefor. Furthermore, it is only political questions which were or could be settled by the shock of arms. Judicial questions must be determined in the court-room and not on the battlefield. When, in a purely judicial controversy between private individuals, a litigant tries to argue from "the changed relations of the States produced by the Civil War," the endeavor to bolster up a weak case is transparent. Moreover, it is generally agreed north of Mason and Dixon's Line that the war was fought to preserve and not to change the relation of the States.

In considering the effect of the multitudinous changes which have taken place since the adoption of the Constitution, it will be well first to examine the nature of such instruments, the basis upon which their authority rests, and the fundamental rules for their interpretation. All language, spoken or written, is valuable only as a more or less imperfect expression of intention. Consequently, any legal instrument — a will, a statute, or a constitution — derives its authority, not from itself, but from the intention of the testator, the legislature, or the people. At the same time, the

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[1] Smith *v.* Alabama, 124 U. S. 465, 478.

[2] See *infra*, pp. 209, 210.

intention which must prevail is not that locked up in the breast, but the expressed intention. The attempt to strike the correct balance between these two opposing tendencies has produced an endless amount of litigation and of legal controversy. Two schools of opinion in relation to this question have existed from the earliest times. On the one hand is the school of strict and literal constructionists, who lay great store by the words, and are loath to look at any other evidences of intention. On the other hand is the school of broad constructionists, whose constant effort is to effectuate the actual intent in whatever way discovered. The one school would insist on construing the document according to fixed rules, and on giving to each word, so far as possible, its dictionary meaning. The other would be much more ready to construe words and phrases in a forced or ungrammatical sense, or to place upon them meanings unknown to the lexicon, in any case where the explanatory extrinsic evidence would seem so to require. The two schools differ widely as to the means to be employed in discovering the intent; but both agree — and this is the important point — that the object of all interpretation is the ascertainment thereof, and that the words derive their value solely from the evidence of intention which they furnish.[1] Consequently, if it is possible, from the instrument itself and such extrinsic evidence as the law allows, to discover the intention of the authors, such intent must prevail.[2] In all cases, the will of the framers of the Constitution, as discovered from the instrument itself and any legally permissible evidence in explanation thereof, is sovereign.

If this rule be not universal, where are the exceptions? What circumstances may be thought sufficient to justify a departure from the intention of the framers? Would any one maintain that the construction of the Constitution should be altered to conform to the present meaning of the words and phrases used therein? Surely, this cannot be. Changes in the meaning of words are

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[1] Sedgwick, Stat. and Const. Construction, 2d ed. 193, 194.

The learned author shows that the authorities are agreed that "the object to be attained in the construction of statutes is the intent of the legislature," and that they differ only in regard to the means to be employed.

[2] "The intent is the vital part, the essence of the law." Sutherland, Statutory Construction, sec. 234.

"Statute law is the will of the legislature;" and "the object of all judicial interpretation of it is to determine what intention is conveyed, either expressly or by implication, by the language used, so far as it is necessary for determining whether the particular case or state of facts presented to the interpreter falls within it." Maxwell, Interpretation of Statutes, 1.

entirely fortuitous. A catching comic song, the whim of a popular writer, or a thousand other purely accidental circumstances may affect the signification of words far older than the Constitution. It cannot be that the fundamental law of the land is subject to variation with every such passing fashion. Otherwise, the interpretation of the Constitution would be the sport of chance and as variable as fortune herself. For example, to take an extreme case, the Constitution vests in Congress the power of regulating commerce with the "Indian tribes." Suppose, in the course of time, "Indian tribes" should cease to denote the aboriginal inhabitants of America, and should come to be applied, by the universal sanction of the best usage, to some other class of the population, say, the negroes. Would Congress thereby acquire the right to regulate commerce between whites and blacks? No one would support so preposterous a proposition. If any such doctrine were upheld, our supposedly stable government would be liable to changes as uncertain as the caprice of an Eastern despot. In whatever ways, then, the interpretation of the Constitution may vary, it clearly must be independent of any mere changes in language.[1]

Perhaps, the most plausible ground for violating the intention of the framers is to be found in considerations of expediency. To follow out precisely in all cases the will of men who lived over a century ago may, in certain contingencies, from the standpoint of policy, be extremely undesirable. The argument is specious that the Constitution, which was designed to be permanent, under the stress of such exigencies, ought to prove elastic and adaptable to changed conditions; that, although the intention of the framers should, theoretically perhaps, always be carried out, yet they could never have intended that an instrument which was to endure through all time should always bear the same construction. But this fact, that constitutional restrictions on the legislative, executive, and judicial departments may unduly hamper the government, is an argument in favor of the English system of the omnipotence of the legislature.[2] It cannot warrant the judicial alteration of the Constitution.[3] Any department possessing the power of

[1] Chief Justice Taney said in the Passenger Cases, 7 How. 283, 478: "If in this court we are at liberty to give old words new meanings when we find them in the Constitution, there is no power which may not, by this mode of construction, be conferred on the general government and denied to the States;" or, it may be added, denied to the general government and conferred on the States. Cf. Vattel's Ninth Rule, Potter's Dwarris on Statutes, p. 127; Smith, Statutes and Const. Law, sec. 482.

[2] 1 Hare, Am. Const. Law, 214, 215.

[3] 1 Story on the Constitution, sec. 426.

altering the construction of the supreme law of the land would be above the Constitution ; and the possession of such power by the courts would be far more dangerous than the right which they have sometimes claimed of annulling legislation which, although not forbidden by any constitutional provision, is yet deemed by the judges contrary to the "first principles of natural justice." The existence of this latter power, although often asserted, is yet by those who have given much thought to the matter generally denied.[1] Nevertheless, such a veto over unwise acts of the legislature is much less dangerous than a similar control over the Constitution itself whenever the emergency may by the courts be thought sufficiently urgent. Accordingly, it is clear, not only that the original intention must prevail wherever discoverable, but also that the intention of the framers was that their words should be applied in their reasonable and proper construction to all cases and circumstances that might in the future arise.

Indeed, this proposition, clearly stated, must command universal assent. Accordingly, those who at heart advocate a contrary doctrine evade and attempt to befog the issue. They resort to high-sounding platitudes, and veil their contentions in sonorous metaphors. The Constitution, they say, is not dead but living. The life of the American people is pulsing through its dry, legal phraseology. "A Constitution which resembles a Chinese shoe can suit only a nation which has sunk into Chinese inertia." Our Constitution is no mere skeleton ; it is a living, growing organism, capable of adapting itself to all the multiplex conditions in which the nation may be involved. All these figures of speech, if understood aright, no doubt express a truth ; but they are more calculated to mislead than assist. Far better is it to recognize plainly that the intent of the framers must forever be followed, however expedient may appear a departure therefrom. Otherwise, the Constitution is not a law but a mere moral precept. There is no middle ground. If it be permissible to "bend," to "stretch," or "adapt" the Constitution even in the most minute details, the same authority may abrogate the plainest, broadest, and most fundamental of its provisions.[2]

Of course, the argument *ab inconvenienti* has its proper place in constitutional law. The men who composed the Federal Conven-

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[1] Cooley, Const. Lims. *200 *et seq.*

[2] Potter's Dwarris on Statutes, 664–66, contains a brief but admirable discussion of this question.

tion of 1787 were wise and far-seeing statesmen; and the fact that this or that construction of their words would produce unfortunate results is potent to show that they never entertained the intention sought to be imputed to them. Again and again, the Supreme Court have acted on this argument. Influenced thereby, they have created exceptions to general and sweeping provisions.[1] They have even overruled prior decisions where the inconveniences to which they would lead have been clearly demonstrated.[2] But, in all cases, they have merely used the unfortunate consequences of this or the other decision as a basis of inference in order to discover the original intention, and never as a warrant for disregarding such intent.[3] This distinction between the correct and the incorrect uses of the argument from expediency is, in practice, so difficult to maintain that doubtless not even the Supreme Court has been infallible in this respect. However, while, in isolated cases, errors in administration have been committed, the judges have never consciously departed from sound principle. They have always declared their opinion that, the original intention being once established, the consequences, however disastrous, do not concern the judiciary.[4]

It follows from this doctrine that wherever considerations of expediency afford no evidence of the original intention, they are irrelevant, and can be entitled to no weight on questions of constitutional law. Thus, where one construction of the Constitution would have been desirable and politic at the time of its adoption, and another at the present day, the former fact, as above stated, justifies an inference as to the original intention, and is, therefore, of great assistance in determining constitutional questions; but the latter clearly is of no such evidential value, and should be altogether disregarded. This is of great theoretical importance at the present time: for the old shackles may prove exceedingly embarrassing now that the United States seem to be entering upon a new sphere of activity and are surrounded by circumstances which even ten years ago were totally unforeseen. Already the argument

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[1] Stone *v.* Mississippi, 101 U. S. 814. But see 1 Story on the Constitution, sec. 427.

[2] Cf. Hans *v.* Louisiana, 134 U. S. 1; The Propellor Genesee Chief *v.* Fitzhugh, 12 How. 443.

[3] Sturgess *v.* Crowninshield, 4 Wheat. 122, 202, 203.

[4] For example, Chief Justice Marshall, after arguing that the framers could not have intended to subject the federal government to all the embarrassments which would result, he thought, from its inability to establish a national bank, added: "If, indeed, such be the mandate of the Constitution, we have only to obey." McCulloh *v.* Maryland, 4 Wheat. 316, 408.

is being advanced that the Constitution must be bent from its original meaning to suit present exigencies. Not only, as we have seen,[1] is this "bending" process inadmissible from the standpoint of the lawyer; but these facts of merely present expediency, arising wholly out of novel and unexpected events, should be entirely disregarded in construing the Constitution. At all events, this is so where, excluding these facts of present expediency, the original intention appears reasonably clear. What is to be done where the original intent is indiscoverable is best reserved for future consideration.[2]

As has been said above, it must be admitted that this doctrine, in certain crises, may seriously hamper the operations of the government, and certain decisions of the Supreme Court have had precisely that effect.[3] That such occasions are so rare is due to the wisdom and foresight of Washington, Madison, Hamilton, and their compatriots: for the inconveniences in question are the necessary consequence of the enforcement by the courts of a written constitution. Admirers of our system of constitutional government are obliged to admit this evil, and are forced to the position that the corresponding advantages of a fixed organic law more than compensate therefor. If ease of alteration to suit the needs of the hour be thought desirable, we must establish an entirely new scheme of government.

Closely akin to this heresy that the Constitution may be judicially altered to suit ephemeral conditions lies the notion that where an error has become inveterate through long-established usage and the opinion of the legislature and executive departments, the courts are powerless to interfere. Of course, the decision of the legislature or executive is always entitled to great deference, and is absolutely binding wherever the question is held to be of a political nature and therefore unsuited for judicial determination.[4] This class of cases affords no authority, however, for an abdication by the courts of their proper functions in non-political controversies merely because Congress or the President has been acting on an erroneous interpretation of the Constitution. To accord such importance to legislative or judicial precedent differs widely from a submission to the authority of decided cases. The latter, as above shown,[5] is justified by the great regard paid by the common law

[1] *Supra*, p. 205. [2] See *infra*, pp. 215, 216.
[3] *E. g.* Pollock *v.* Farmers' Loan & Trust Co., 158 U. S. 601.
[4] Luther *v.* Borden, 7 How. 1; Georgia *v.* Stanton, 6 Wall. 50.
[5] *Supra*, p. 202.

to prior adjudications. But that system of jurisprudence attached by no means the same importance to the *dicta*, however elaborate and well considered, of judges and learned text-writers, or to the opinions, even when acted upon, of the unlearned laymen who may happen to occupy important legislative or executive offices. Of course, the adoption by some prominent official of this or that construction of the Constitution, and the acquiescence therein by the people, are valuable evidence of the meaning of the framers; but these facts would seem to furnish no excuse for a refusal by the courts to exercise their prerogative of annulling legislation which, in their opinion, is contrary to the true interpretation of the Constitution.

A very similar question arises in reference to the construction of statutes; and, upon that subject, it is held that "the understanding and application" of the statute when it "first comes into operation, sanctioned by a long acquiescence on the part of the legislature and the judicial tribunals, is the strongest evidence that it has been rightly explained in practice."[1] This is so because "those who lived at or near the time when it was passed may reasonably be supposed to be better acquainted than their descendants with the circumstances to which it had relation as well as to the sense then attached to legislative expressions."[2] It may be that some cases go further; and, giving a more than evidential value to such usage, even treat it as precluding the court from investigating the question *de novo*. This, however, seems to be giving undue weight to such considerations; and both on principle and by the preponderance of authority,[3] where it is possible to discern the legislature's intent, even long-established custom, if in conflict therewith, must be overruled. Thus, Lord Ellenborough observed, "It has been sometimes said, *communis error facit jus;* but I say *communis opinio* is evidence of what the law is."[4] So, in United States *v.* Dixon,[5] Judge Story, speaking for the Supreme Court, said: "The construction given by the treasury department to any law affecting its arrangements and concerns is certainly entitled to great respect. Still, however, if it is not in conformity to the true

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[1] Packard *v.* Richardson, 17 Mass. 121, 143.

[2] Maxwell, Interpretation of Statutes, 2d ed. p. 367.

[3] Greely *v.* Thompson, 10 How. 225; U. S. *v.* Graham, 110 U. S. 219; Herbert *v.* Purchas, L. R. 3 C. P. 605, 650 (*semble*).

[4] Isherwood *v.* Oldknow, 3 M. & S. 396. See, also, Broom's Legal Maxims, 2d ed. p. 104.

[5] 15 Pet. 141, 161.

intendment and provisions of the law, it cannot be permitted to conclude the judgment of a court of justice."

At all events, whatever may be the true doctrine in regard to statutory construction, the case is very different where a constitution, and above all the federal Constitution, is concerned. The consequences of an error are so much more serious. In the case of a statute, it may perhaps be thought better to leave to the legislature the correction of a misinterpretation of its words, if the error be sanctioned by well-settled custom. But the case of the Constitution is different. There is no assembly with frequent sessions representing the sovereignty of the people of the American States, to which the courts may refer the correction of an established error. A constitutional amendment is so remote a possibility as scarcely to be worth consideration. The judiciary must decide between the perpetuation of the error and the overthrow of the usage. Would any judge hesitate which horn of this dilemma to choose? If the question be conceded to be doubtful where the construction of a mere statute is concerned, surely in regard to the Constitution, where the reasons for repudiating an error are so much stronger, no room exists for hesitancy.[1]

Indeed, so important is the establishment of the correct construction of the Constitution that even the authority of previous judicial decisions has been thought insufficient to justify a departure from the true intent and meaning of the instrument. Thus, Chief Justice Taney, in a case relating to the power of the States over interstate commerce,[2] said: "I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by the decision of this court. I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to be founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." While this advanced position would prove in practice very inconvenient and has in fact been long since repudiated, still, even at the present day, many lawyers would agree with Mr. Justice Miller when he declares:[3] "With as full respect for the authority of former decisions as belongs, from teaching and habit, to judges trained in the

[1] See Cooley, Const. Lims. *66 *et seq.*

[2] Passenger Cases, 7 How. 283, 470.

[3] Washington University *v.* Rouse, 8 Wall. 441, 444.

common law system of jurisprudence, we think there may be questions touching the powers of legislative bodies which can never be closed by the decisions of a court." Without adopting the radical views of Taney, or even the more conservative opinions of Miller, all must concede that constitutional cases are overruled more frequently and with less compunction than decisions establishing a rule of property or laying down some principle to be acted upon in mercantile transactions, or, indeed, than cases upon any other branch of the law.[1] A glance at the list of overruled cases in the reports of the Supreme Court,[2] especially at the oscillations of that tribunal upon the subject of interstate commerce,[3] is sufficient to establish this proposition. If, then, the weight of decided cases is relatively so slight, if the fundamental common law principle of *stare decisis* is given no more consideration, surely the mere practice of administrative officers, which unquestionably deserves less attention, should never be allowed to override the intent of the framers, although, indeed, it may properly control in cases of irremovable ambiguity.

It is well here to reiterate that the opinions of government officials, acted upon and put into practice, especially if they date from a time nearly contemporaneous with the adoption of the Constitution and have been constantly acquiesced in, are entitled to great evidential weight in endeavoring to arrive at the meaning of the framers. For they show the opinions of those best qualified to know the original intention. Thus, in Stewart *v.* Laird,[4] upon a question of constitutional law, the court said: "Practice and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a con-

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[1] Pollock *v.* Farmers' Loan and Trust Co., 157 U. S. 429, 579.

The weight to be given to precedent was ably emphasized in the opinions of the dissenting judges. 157 U. S. 636–639, 650–652, per White, J.; 158 U. S. 663, per Harlan, J.; 158 U. S. 689–691, per Brown, J. The majority of the court apparently felt little difficulty in disregarding "a century of error."

[2] *E. g.* Chisholm *v.* Georgia, 2 Dall. 419; Davidson *v.* New Orleans, 96 U. S. 97; State Tax on Foreign-Held Bonds, 15 Wall. 300; Hepburn *v.* Griswold, 8 Wall. 603; Springer *v.* U. S., 102 U. S. 586; The Thomas Jefferson, 10 Wheat. 428.

[3] Compare N. Y. *v.* Miln, 11 Pet. 102, with the Passenger Cases, 7 How. 283; The License Cases, 5 How. 504, with Leisy *v.* Hardin, 135 U. S. 100; Plumly *v.* Mass., 155 U. S. 461, with Schollenberger *v.* Pennsylvania, 171 U. S. 1; Peik *v.* Chicago, etc. Ry., 94 U. S. 164, with Wabash, etc. Ry. Co. *v.* Illinois, 118 U. S. 557; Hall *v.* DeCuir, 95 U. S. 485, with Louisville, etc. Ry. Co. *v.* Miss., 133 U. S. 587.

[4] 1 Cranch, 309.

temporary interpretation of the most forcible nature."[1] In this connection, it is important to note that great stress is here and uniformly laid upon the contemporaneous character of the usage.[2] A merely modern practice would, of course, be of much less value as evidence, and might in many cases deserve scant courtesy.

The objection may be raised that the whole of the foregoing argument in favor of the sovereignty of the original intent proceeds on the assumption, first, that the language of the Constitution is the language of the Constitutional Convention, whereas, in theory at least, it is the language of the American people; and, secondly, that all the members of the Constitutional Convention entertained the same intent and understood the Constitution in the same way, whereas in fact they differed widely in regard to those matters. This objection, while unquestionably founded on substantial difficulties, is really not germane to the present subject. For the present purpose, it would be sufficient to state that the intention of some person or persons, real or imaginary, living at the close of the eighteenth century, must prevail — the intention, perhaps, of the reasonable man of that period. But after all, the matter is but little more complicated than the interpretation of a statute, which is theoretically the language of the hundred or more members of the two houses of the legislature. In every case, the important point is the expressed intention. In all cases, the declarations of individual members of the legislature, of the convention, of the people at large, if admissible at all, are received merely as evidencing the intention which the words, construed in the light of the surrounding circumstances, reasonably express. This intent it is which must control. No better evidence thereof could be found than the unanimous opinions of the framers themselves. They were fully imbued with the "spirit of the Constitution." They knew better than any one else the purpose of each clause thereof. And they were as well acquainted as anybody with the English language as then used. Unless, therefore, by some curious slip, they have utterly failed by their language to express the intent which their declarations or actions show them to have entertained, their construction of the instrument is practically conclusive evidence of the interpretation which should to-day be adopted.

Excluding, then, cases covered by the doctrine of *stare decisis*

[1] See, also, The Laura, 114 U. S. 411.

[2] "*Contemporanea expositio est optima et fortissima in lege.*" 2 Inst. 11. Smith on Statute and Constitutional Law, chap. xiii.

or by the result of the Civil War, we may lay down this universal and cardinal rule of constitutional law, — the intent of the framers, if ascertainable, must in all cases prevail, provided the words be deemed an adequate expression thereof.

Although this proposition is, upon analysis, readily seen to be impregnable, yet many even of the most learned constitutional lawyers frequently overlook, rather than intentionally disregard, its truth and applicability. If the matter were specifically called to their attention, few of them would deny the soundness of the proposition in question, and almost all of them would acknowledge their own inadvertent errors. Consequently, such statements, of which many are to be found among the utterances of politicians and some within the covers of law treatises,[1] should not be accepted as weighty authority, but should be accorded only such slight deference as is warranted by their nature as *obiter dicta*, by the evident thoughtlessness with which they were spoken, and by the absence of any sound reason upon which to support them.

Before discussing cases where the intent of the framers is indiscoverable, it is important to note that many cases which were not and could not have been specifically in the minds of the framers were really covered by their general concepts, and are, therefore, in a true sense included within their actual intention. For example, the word "commerce" to the men of 1789 denoted in particular those special forms of intercourse with which they were familiar — the stage-coach and the sail-boat. But from these individual instances they had formed a broad and general concept including at least all conceivable means — whether at that time known or unknown — by which commodities might be bought, sold, and exchanged. When, therefore, the steamboat and the locomotive were invented, those forms of intercourse were held, and of course properly held, to be included within the term "commerce" as used in the Constitution. In so declaring, the courts merely passed upon the limits of the conception of commerce as it existed in the minds of the framers of the Constitution. That these statesmen are thus judicially declared to have meant what they never heard of is only an apparent absurdity. Indeed, the same paradox is frequently illustrated in everyday life, and is necessarily incidental to the use of generic terms. For example, when we say, "All men are mortal," do we not mean to predicate the fact of each and every individual of all the countless myriads of human

[1] 1 Story on Const. sec. 425; Mason, Von Holst's Const. Law of U. S. sec. 1.

beings, even those yet unborn and those of whose existence we are totally unconscious? So, when it is said, "All trees belong to the vegetable kingdom," the banyan of India and the sequoia of California are clearly included, although the speaker may never have heard of those varieties.

It is important to grasp this notion of the comprehensiveness of general terms, not only in order to avoid a departure from the original meaning of such words, but also in order to obviate the possibility of an erroneous inference from decisions holding the words of the Constitution applicable to newly arising conditions. For example, it is sometimes thought that the cases holding railway and telegraphic communication to be "commerce" show that the Constitution is altering and growing to keep pace with modern meanings of its words and with modern economic conditions. But the meaning of commerce has not changed.[1] It is the same to-day as in the eighteenth century. Nor did the courts in these cases yield to considerations of expediency. They were called upon merely to define the limits of the conception of commerce as it existed in the minds of the framers; and if this could be done with perfect accuracy, it would be easy to determine whether a given case falls therein. However, while the fixing of exact boundaries for the shadowy conception which the men of 1789 designated by such a word as commerce is indeed difficult and often impossible, the attempt to do so is never irrational, and may without absurdity lead to the declaration that the wide though indefinite territory included within such terms embraces many things which never occurred to those whose language is being construed.

An excellent example of the class of cases just mentioned is furnished by the interpretation of the clause granting admiralty and maritime jurisdiction to the United States. The question arose whether this jurisdiction covered only those waters within the ebb and flow of the tide, as was the English rule, or whether it extended to the Great Lakes and vast navigable rivers of the West.

1 "Constitutional provisions do not change, but their operation extends to new matters as the modes of life and habits of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon and on water by canal-boat and sailing-vessel, yet in its actual operation it touches and regulates transportation by modes then unknown. Just so it is with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of intercourse unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop." Per Brewer, J., *In re* Debs, 158 U. S. 564, 590.

The answer to be given depended on the intent and meaning of those who formed the Constitution. Evidently, the framers of the instrument had been thinking chiefly and particularly of the ocean and of the comparatively small rivers and bays of the Atlantic coast, in which the ebb and flow of the tide is a tolerably accurate test of navigability. They did not have specifically in mind the great Western rivers and lakes, which were then little known, and on which no commerce was transacted. The question, therefore, resolved itself into this: Did the framers conceive of the waters covered by admiralty jurisdiction as comprising only those within the ebb and flow of the tide, or did they entertain a broader conception, of which the navigable waters of England and the Atlantic States, roughly determined by the ebb and flow of the tide, were merely examples? If they held the former view, the fact that reason, justice, and expediency demanded an extension of the jurisdiction would not justify a court in applying a broader definition than the framers had in mind. It would not have sufficed even to show that, if they had been reminded of the great inland seas and rivers, they would so have extended their language as clearly to have embraced them. It had to be proved that such waters actually were covered by the words and meaning of the Constitution; that the authors thereof did not regard the tidal character of the water as the absolute criterion of maritime jurisdiction, but looked upon it merely as a handy rule to be applied only where, as in England and the Atlantic States, the ebb and flow of the tide is the approximate limit of navigation. This was the view of the framers' meaning which the Supreme Court finally adopted.[1] Whether, as an original question, their decision was correct is certainly open to much doubt, but it is clear that, assuming the original intention to have been as they concluded, the great navigable rivers of the West, while not specifically in the minds of the framers as subject to the jurisdiction of admiralty, were yet actually covered by their general concepts.[2]

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[1] The Genesee Chief *v.* Fitzhugh, 12 How. 443 (overruling The Thomas Jefferson, 10 Wheat. 428).

[2] From the decision in Genesee Chief *v.* Fitzhugh, *supra*, Mr. Justice Daniel vigorously dissented. He thought that the ebb and flow of the tide was deemed by the framers the ultimate extent of admiralty jurisdiction, and that the Supreme Court, in overruling their earlier decision, were claiming for themselves, "wholly irrespective either of the Constitution or the legislation of Congress, powers to be assumed and carried into execution by some rule which in the judgment of this court is to be applied according to its own opinions of convenience or necessity." 12 How. 464. If this had been a correct statement of the majority's position, the dissent would have

But after making all due allowance for these cases, which are in reality, though not apparently, within the actual intention of the Constitution makers, of course it often happens that the meaning of the framers cannot be ascertained. The imperfection and vagueness of human language, the difficulty of placing ourselves in the position of men who lived so long ago — these and many other causes explain the many doubts and uncertainties in which the interpreter of the Constitution finds himself involved. The present paper is only incidentally concerned with the general inquiry of what is to be done under such circumstances. The only question which is really a part of the present subject is how far the decision in such cases may properly be influenced by the changes which have taken place since the adoption of the Constitution. Upon the general question it is sufficient to say that when insoluble doubts arise, rules of construction — rules of positive law — come into play. Thus, we have the rule that powers not expressly or impliedly granted to the general government are reserved to the States; that the sovereign is not ordinarily to be construed as covered by general words; that penal provisions are to be strictly construed; that the court will presume in favor of established practice, and so on. The precise application of these rules of positive law is obscured by the fact that all of them are founded in reason and aim at upholding the probable intention. At the same time, they are now more than rules of logic, and have crystallized into rigid rules of law. Thus, as above shown, long-continued executive or administrative usage is evidence, and and often very cogent evidence, of the original intention: but if, after giving all due weight to this and other probative matter, the court still deems the actual intent doubtful, the force of the usage as evidence is exhausted; but its effect under the rules of positive law is then for the first time felt. Then, and not till then, does the doctrine properly apply that in doubtful cases the practical construction of those to whom the enforcement of the law is intrusted shall control. These rules of construction are not to be allowed to defeat the actual intent; but the presumption which they raise is not overthrown merely by showing that, all things considered, the intent of the legislature, or of the people, is doubtful. Indeed, it is in such cases that the "presumption" has its only real operation.

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been amply justified. But it is a clear misapprehension; for the opinion of the court advances no such claim. The case proceeds not upon any such pretensions, but wholly on a different view as to the actual meaning of the framers.

In the application of these rules of construction, in the nature of things, the changes which have taken place since the adoption of the Constitution can, in general, play but little part. But suppose the circumstances to which one of these rules attaches its consequences have originated in modern times, long after the adoption of the Constitution. For example, in doubtful cases, the court will incline against a construction which is productive of inconvenient results.[1] Now, suppose one construction would have been desirable from the standpoint of policy at the time the Constitution was adopted, and another at the present day. Towards which interpretation does the rule above stated require the court to incline? As above shown, the origin of all such rules is the probability that by enforcing them the court will arrive at the actual intention. But facts of merely modern expediency can furnish no basis of inference as to the meaning of the framers; and, therefore, the reason of the rule ceasing, the rule itself should give way. All analogy is against yielding, even in doubtful cases, to the present inconvenient consequences of a construction which in the earlier years of the republic would have been free from any such objection. To hold otherwise would permit a different construction of the Constitution from that which would have been adopted if the court had been sitting soon after the formation of the Union. In the writer's judgment, such a course should never be followed. Opinions upon the question may, however, fairly differ; and, no doubt, the opposite view would not lack strenuous supporters. Indeed, as the case is one where, *ex hypothesi*, the actual intent of the framers is indiscoverable, all reasoning concerning it is somewhat unsatisfactory. Moreover, the matter is of less practical than theoretical importance, because, whatever may be a judge's opinion upon the abstract question, his decision will almost inevitably be unconsciously influenced by his knowledge of the immediate ill effects which a theoretically correct judgment might produce. The reason, therefore, for insisting on what seems to the writer to be the true view is rather to round out a theory than to attain a practical result.

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[1] Gibbons *v.* Ogden, 9 Wheat. 1, 188, 189.

[To be continued.]